KOPERASI SERBAGUNA CUEPACS TANGGUNGAN BHD.

v.

CITY INVESTMENT SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN FJ
GEORGE SEAH FJ
MOHD. AZMI FJ
[CIVIL APPEAL NO. 117 OF 1982]
26 FEBRUARY 1983

CIVIL PROCEDURE: *Preliminary objection - Whether Judicial Commissioner had jurisdiction - Application first heard by one Judge - Whether another Judge could proceed with application - Order 35 r. 11 - Meaning of "or other cause" - Meaning of "trial".*

At the commencement of the appeal, the appellant raised a preliminary objection on the question of whether the learned Judicial Commissioner had any jurisdiction to proceed with the trial at all, as it was first heard by Abdul Razak J that is whether the case fell within the scope of "or other cause" in O. 35 r. 11.

Held:

[1] Abdul Razak J had not completed his hearing but however it was not necessary to decide on the meaning and scope of "or other cause" in O. 35 r. 11. [But *Chua Chee Chor v. Chua Kim Yong & Ors.* [1963] 29 MLJ 17 was discussed and distinguished].

[2] Order 35 r. 11 did not apply to the case before the Court. The word "trial" in O. 35 r. 11, in connection with which there is "evidence already recorded" means the final determination of the main suit and not determination of any interlocutory application therein. A Judge has absolute discretion to leave any interlocutory matter to another Judge to hear submissions *de novo* and make a decision thereon. [*Wozniak v. Wozniak* [1953] 1 All ER 1192]

[Preliminary objection overruled.]

Cases referred to:
Chua Chee Chor v. Chua Kim Yong & Ors. [1963] 29 MLJ 17
Wozniak v. Wozniak [1953] 1 All ER 1192

Legislation referred to:
Civil Procedure Code (Trengganu), s. 75
Rules of the High Court 1980, O. 35 r. 11

Other source referred to:
Stroud's Judicial Dictionary, 4th Edn., Vol. 3, p. 1884

For the appellants - S. Devi; M/s. N. Saraswathy Devi
For the respondents - P. Cumaraswamy (PP Royan with him); M/s. Shook Lin & Bok

JUDGMENT

Wan Suleiman FJ:

At the commencement of the appeal, Counsel for the appellant raised this preliminary objection on the question of whether the learned Judicial Commissioner had any jurisdiction to proceed with the trial at all in view of what had transpired before.

This same point had been raised at the commencement of proceedings before the learned Judicial Commissioner as will appear from his judgment, the relevant part of which is set out hereunder:

> When the application came up for hearing before me on 2 April 1982 learned Counsel for the plaintiffs raised a preliminary objection that I had no jurisdiction to hear it on the ground that it was first heard by Abdul Razak J who had not given his decision. Learned Counsel for the defendants submitted that the plaintiffs had filed fresh affidavits for hearing before me. He referred to O. 35 r. 11, of the Rules of the High Court, 1980, and submitted that the learned Judge had not concluded the case, and that I had jurisdiction to hear the application.
>
> The short answer to that objection is that upon his transfer from Seremban to Kuala Lumpur Abdul Razak J had indicated through his Secretary, who had minuted the file accordingly, that he was unable to conclude the case. I had spoken to the learned Judge personally on 31 March 1982 and he indicated that I should hear this application afresh. In my opinion this case falls within the scope of 'other cause' in O. 35 r. 11. Accordingly, I ordered the application to be heard *de novo* before me based on the affidavits filed in Court.

Order 35 r. 11 reads as follows:

> (1) When a Judge who has commenced a trial of any proceedings is unable through death, illness or other cause to conclude the trial, another Judge may with the consent of the parties deal with the evidence already recorded and proceed with the trial from the stage at which the previous Judge left it.
>
> (2) Nothing herein shall prevent Judge who continues the trial from recalling all or any of the witnesses or taking their evidence afresh.

S. Devi for the appellants says that the words "or other cause", which should be construed *ejusdem generis* do not cover the circumstances. In other words she is saying that Abdul Razak J and not the learned Judicial Commissioner is the one who has jurisdiction to proceed.

A perusal of the High Court file discloses the following:

On 22 February 1980, upon hearing a Summons-in-Chambers, Ajaib Singh J issued an interlocutory injunction restraining the respondents from agreeing to sell, selling, transferring or in any way dealing with the several pieces of land enumerated in the order until determination of the High Court Civil Suit No. 189 of 1980 or until further order of the Court.

On 30 March 1981, the respondents' application to set aside the injunction was heard before Abdul Razak J and decision was reserved.

However, on 28 September 1981 the same Judge ordered the respondents to file within 3 months a statement of accounts, which were duly filed on 28 December 1981.

It was at this stage that Abdul Razak J requested Wong JC to complete the hearing of the application to set aside the injunction.

We agree with Mr. Cumaraswamy that Abdul Razak J had not completed his hearing.

Our attention was also drawn to the decision in *Chua Chee Chor v. Chua Kim Yong & Ors.* [1963] 29 MLJ 17.

This was an appeal from the decision of the Federation Court of Appeal ([1960] MLJ 127).

The plaintiffs (respondents in this appeal) were sons and widow of another son of one C, deceased and they claimed *inter alia* a bicycle shop in the defendant's (appellant's in this appeal) possession and 242 shares in the Trengganu Bus Co. Ltd. registered in the defendant's name as being part of the estate of the deceased. The defendant who was one of the sons of the deceased denied these claims. The trial before Abdul Hamid J lasted for nine days after which the learned trial Judge reserved judgment and he later retired before delivering judgment. The case was then heard by Neal J and both parties made application that Neal J should decide on the case on the evidence as recorded by Abdul Hamid J who had taken a full note. Neal J was also provided with copies of the exhibits and the previous submissions of Counsel. Neal J acting under s. 75 of the Trengganu Civil Procedure Code held that as the bicycle shop and the shares were specified in the letters of administration to the estate of the deceased, they were the property of the deceased. He further decided as a fact that the shop and the shares were the property of the deceased. On appeal to the Court of Appeal it was held that Neal J had erred in law in holding that the matter was decided by the letters of administration. The Court of Appeal further by a majority affirmed the finding of fact by Neal J. Before the Judicial Committee of the Privy Council it was contended that (a) Neal J had no jurisdiction to act as he did because s. 75 of the Code did not cover a case where there were no depositions and therefore no recording of the evidence save in the Judges notes, and where a hearing was not being "continued" but had already been concluded save in so far as judgment remained to be delivered and (b) even if he had jurisdiction, the courses which he adopted was contrary to the principles of justice and the judgment should be set aside and a new trial ordered.

Held:

[1] the evidence in this case had been "taken and recorded by a Judge" within the meaning of s. 75 of the Trengganu Civil Procedure Code, which applied alike to civil and criminal cases, and, further, the hearing was being "continued" before Neal J who in fact, heard further submissions by Counsel;

[2] while the course adopted by Neal J considered *in vacuo* was plainly undesirable and a precedent not to be followed, the circumstances were very unusual, and the material before the Judge, although a very insecure foundation for disputed questions of fact, was that on which the parties had asked to have the case decided, and its inadequacy affected each party alike;

[3] the procedure which the defendant had requested, and of which he had made no complaint in the Courts below, could not be regarded as a denial of justice.

We note that in *Chua's* case both parties had agreed that the trial (at which oral evidence was adduced) should proceed on the basis of the evidence recorded by the retired Judge, so that it cannot apply on the facts of the present appeal where the appellant, at least does not consent, and where only submissions were made, and affidavits tendered was in evidence.

Mr. Cumaraswamy referred to us to Vol. 3 of *Strouds Judicial Dictionary*, 4th Edn., p. 1884 in support of his proposition that the word "other" in the rule should not be construed *ejusdem generis*, for

> it would seem that the *ejusdem generis* rule of interpretation has but little, if any, value in statutes conferring discretionary powers on the judiciary or such like public functionaries. Thus, the power to remit to the County Court actions for "malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort." in cases where the plaintiff had no visible means of paying costs (County Courts Act 1867 (c. 142), s. 10), seems to have applied to all actions of tort without limitation (*Clapham v. Oliver*, 30 LT 365).

We do not think we need to decide if he is indeed correct in his surmise.

It would suffice if we were to say that in our view, the word "trial" in O. 35 r. 11 in connection with which there is "evidence already recorded", should be given the meaning to it in another context, in *Wozniak v. Wozniak* [1953] 1 All ER 1192, wherein Denning LJ held that a trial means the final determination of the main suit and not determination of any interlocutory application therein.

In other words, O. 35 r. 11 does not apply to interlocutory proceedings and a Judge has absolute discretion to complete the hearing of any interlocutory matter and make an order, or leave it to another Judge to hear submissions *de novo* and make a decision thereon.

We therefore overrule the preliminary objection lodged by S. Devi.

Also found at [1983] 1 CLJ 173